85-785

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RIVER ROAD ALLIANCE, INC., *et al.*,
Petitioners,

vs.

CORPS OF ENGINEERS, etc., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court reviewing the sufficiency of an administrative agency's compliance with the National Environmental Policy Act may substitute its own judgment for that of the agency as to the environmental consequences of the agency action.

2. Whether an administrative agency's statutory duty to prepare an environmental impact statement is excused by a judicial evaluation that the time and expense of preparing an environmental impact statement would not be commensurate with the likely benefits of preparing an environmental impact statement.

3. Whether, when an applicant for a federal permit finds no alternative to the proposed action suitable, the federal agency has a duty to identify and assess appropriate alternatives.

PARTIES TO THE PROCEEDING

The following is a list of all parties to this proceeding:

Petitioners

1. River Road Alliance, Inc., a corporation
2. Coalition for the Environment,* a corporation
3. New Piasa Chautauqua, a corporation
4. Charles F. Hobbs
5. People of the State of Illinois (filing separate petition and separate appendix)

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* After this suit was filed, the Coalition for the Environment changed its name to Missouri Coalition for the Environment Foundation. It is affiliated with the Missouri Coalition for the Environment.

Respondents

1. Corps of Engineers of the United States Army
2. John O. Marsh, Jr., individually and as Secretary of the Army
3. William R. Gianelli, individually and as Assistant Secretary of the Army for Civil Works
4. Lt. Gen. Joseph K. Bratton, individually and as Chief of Engineers, Corps of Engineers of the United States Army
5. Col. Gary D. Beech, individually and as District Engineer for the St. Louis District, Corps of Engineers of the United States Army
6. National Marine Service Incorporated,** a corporation

** According to the brief filed by National Marine Service in the court of appeals, NICOR Inc. is the parent corporation of National Marine Service Incorporated.

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No.

IN THE
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October Term, 1985

RIVER ROAD ALLIANCE, INC., et al.,
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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OPINIONS BELOW

The majority opinion and the dissenting opinion of the court of appeals (App. 1, 15)[1/] are reported at 764 F.2d 445. The judgment of the district court

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1. The State of Illinois and the River Road petitioners have agreed to file separate petitions, because of a difference of opinion concerning which questions presented by the decision below most compellingly call for review by this Court. The State of Illinois is filing

(App. 28) is not reported. The Environmental Assessment (App. 38) and Findings of Fact (App. 43) of the Corps of Engineers are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1985 (App. 24). Timely petitions for rehearing, with

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1/ cont'd.

the Appendix separately bound. This petition will cite that Appendix as "App. ___."

There was no trial. The record of the proceedings in the district court consists largely of documents, each identified by the Clerk of the district court by a docket entry number. Those documents will be cited by those numbers. For example, the document numbered "1" in the River Road docket file will be cited as "D.E.I 1." The document numbered "8" in the State of Illinois docket file is cited as "D.E.II 8."

The purported "administrative record" filed with the district court by the Corps of Engineers consists of three volumes. These will be cited by volume number and page number, as, for example, "I:279."

suggestions for rehearing en banc, were denied by an evenly divided court on August 8, 1985 (App. 26). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332, is set out in pertinent part at page A-1, **infra.** Relevant regulations of the United States Army Corps of Engineers are set out in pertinent part at page A-2, **infra.** Relevant regulations of the Council on Environmental Quality are set out in pertinent part at page A-8, **infra.**

STATEMENT OF THE CASE

1. Description of Alton Lake and the Great River Road

Upstream from St. Louis, Missouri, at

Alton, Illinois, on the Mississippi River, there is a dam built and maintained by the Corps of Engineers. The dam gives rise to a pool which extends for miles upstream, as far as the junction of the Mississippi with the Illinois River. This pool is commonly known as Alton Lake.[2/]

Located in a metropolitan area with a population of more than two and a half million people, Alton Lake has long been a principal recreation resource for the area. Alton Lake is the most intensively used pool on the Mississippi River. On its perimeter are more than 47 large boat

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2. The facts set forth in the first two sections of the Statement of the Case are found in the sworn complaint (D.E.I 1), not contravened by any counter-affidavit. Many are matters subject to judicial notice in the Southern District of Illinois, as is substantially conceded by the Corps' answer (D.E.I 25). See also District Court decision (App. 28).

marinas (both power boats and sailboats), 57 private duck hunting and fishing clubs, numerous picnic grounds, fishing sloughs, archaelogical sites, public access areas, and wooded river banks and wetlands occupied by wildlife.

On the eastern side of Alton Lake limestone bluffs tower above the lake, set back from the water by 100 to 200 feet. These bluffs constitute a major scenic asset of the Mississippi River. This portion of the Lake is widely known for its panoramic vistas, including seven miles of unobstructed shoreline (D.E.I 28). As the Corps agreed, all interested persons, "including the applicant [National Marine], were in full accord in acclaiming the unique attractiveness of the areas adjacent to appellant's worksite" (App. 35).

The Great River Road (together with a

bikeway), from Alton, Illinois (the dam site) upstream to the confluence of the Illinois and Mississippi Rivers at Grafton, Illinois, is situated on the narrow strip of land between the Lake and the bluffs. The construction of the Road was financed principally with federal funds. 23 U.S.C. § 148; 23 C.F.R. §§ 661.4, 661.6. The State of Illinois has authorized the construction, improvement and maintenance of the Great River Road, Chapter 121 §§ 3-104.3, 106, Ill. Stat. Ann., and has exercised the power of condemnation to remove industrial use from the vicinity of the Great River Road, converting the parcel in question to rest areas and scenic overlooks, in order to preserve the natural beauty of the Great River Road. **E.g., Department of Public Works & Buildings v. Keller**, 61 Ill.2d 320, 335 N.E.2d 443 (1975). The

Great River Road, from Alton to Grafton, attracts tourists from all over the country, and is heavily used by inhabitants of the metropolitan area.

In 1980, a number of barge companies began to apply to the Corps for permits allowing barge fleeting along the shore of Alton Lake (D.E.II 8; D.E.I 11). A barge fleeting facility provides storage for a number of large barges, generally by means of a "dead man" anchoring device on shore or on the river bed. High horsepower towboats deposit and retrieve the barges and move them about in the process of making up a "tow" or group of barges.

In or about August, 1980, Riverway Towing Company (respondent National Marine's predecessor) applied to the Corps for a permit for such a facility along the eastern shore of Alton Lake,

downstream from Grafton, near Riverway's barge repair yard at Grafton (I:1-2). That fleeting area would extend 1500 feet along the bank, and approximately 180 to 200 feet into the river channel.

2. Environmental Impact

According to the sworn allegations of the amended complaint, not contravened by affidavit or testimony, the operation of the National Marine barge fleeting facility, and especially the operation of more than one such facility on the lake, would have several impacts of concern. It would substantially impair the scenic beauty of the Great River Road, the limestone bluffs, and the lake. As the court of appeals noted (App. 7), the barge fleeting facility would be "an unfortunate eyesore, marring one of the few remaining spots of essentially unspoiled

natural beauty on the Mississippi River in the general vicinity of St. Louis." It would be obtrusively visible to travelers on the Great River Road and bicycle path, to persons who live or spend vacations in Chautauqua, Elsah, and Grafton, and to the multitude of people who use Alton Lake for sailing, motorboating, fishing, hunting, waterskiing, swimming, and other recreational pursuits. The barges would partially obstruct the view of the Lake from the River Road. The barges and tows, and their maneuvering, would also constitute a substantial safety hazard to all persons using Alton Lake for recreational pursuits, especially those in boats not under power.

The barge fleeting facility would have a significant irreparable adverse impact on the largest mussel bed in a 300-mile reach of the Upper Mississippi,

located at the fleeting site (I:269). The bottom-scouring propeller wash and suspended mud and silt scoured out by the high-horsepower towboats which use such fleeting facilities, passing directly over the entire mussel bed, are expected to propel the mussels to less secure habitats and bury them with sediments (I:271), resulting in significant impacts to this biological resource (I:268). The adverse impact on the mussels will also adversely affect those fish which feed on them, those organisms for which the mussel shell provides a firm substrate, and the fish or birds which feed on those fish or organisms, such as the bald eagle and various migratory birds. Mussels are also an important and unique scientific tool, providing valuable data respecting pollutants.

Propellers and propeller wash caused

by the barge fleeting operations will also disturb the catfish wintering in the vicinity of the fleeting facility (I:268), in much the same way as they disturb the mussels. Catfish are an important commercial, as well as sport-fishing, resource in Alton Lake.[3/]

Both Chautauqua and Elsah, villages 1.5 and four miles, respectively, downstream (App. 18) from the proposed fleeting site, are on the National Register of districts, sites, buildings, architecture, archeology, and culture, pursuant to § 101(a)(1) of the National Historic Preservation Act of 1966, as

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3. The Illinois Geological Survey and the United States Fish and Wildlife Service both opposed the issuance of the permit on account of the potential damage to mussels and overwintering catfish (II: 151-52, I: 268). The Illinois officials took their protest to court in the case consolidated with the River Road case. USFWS protested through administrative channels. See pp. 13-14, **infra**.

amended, 16 U.S.C. § 407a(a)(1) (D.E.I 27). The construction and operation of the proposed barge fleeting facility, by impairing the view from and otherwise adversely affecting both Chautauqua and Elsah, would have a serious adverse impact on these historic sites, and on the Great River Road (D.E.I 28; D.E.I 1, ¶ 18).

3. Corps of Engineers Proceedings

A public hearing was held by the Corps on December 18, 1980, concerning the National Marine application and an application filed by another applicant for a second barge fleeting facility on the Lake (II:passim). Approximately 300 people attended the public hearing (II:ii-xxx, following 226), many speaking in opposition. On October 30, 1981, the District Engineer issued his Environmen-

tal Assessment ("EA") and Finding of No Significant Impact ("FONSI"), ruling that no environmental impact statement was required (App. 38). On June 15, 1982 he issued his Findings of Fact (App. 43).

On July 8, 1982 the Fish and Wildlife Service wrote (I:268) the Division Engineer, requesting elevation of the controversy for review at a higher level. In that letter USFWS reiterated its request that the permit application be denied, and reiterated its "objective . . . to protect the mussel bed and overwintering catfish site from impacts caused by barges and tows moving into and out of the area." On July 21, 1982 USFWS wrote (I:273) the District Engineer, asserting its intention to elevate the proceeding for review at the highest level pursuant to the new Memorandum of Agreement between the two Departments of

the government. Nevertheless, the District Engineer issued his final notice of intention to issue a permit on August 3, 1982 (I:276). On August 25, 1982, USFWS requested elevation of the controversy to the Assistant Secretary of the Army (I:279). On September 15, 1982 (apparently), the Assistant Secretary of the Army rejected this protest, and declined even to consider the impact on catfish (I:279).

On October 5, 1982 (App. 12), the District Engineer issued the barge fleeting permit (I:313). The permit authorizes fleeting until completion of a new Lock and Dam 26. (Even today that date is quite uncertain (App. 16)). Among the conditions attached to the permit was the requirement that National Marine, after two years of operation of the barge fleeting facility, submit a

report on the size, location and density of the mussel bed, prepared in such a way as to enable comparison with the status of the mussels reflected in a 1981 report.

4. Proceedings in the District Court

Before the Corps issued the permit, petitioners River Road Alliance, Coalition for the Environment, New Piasa Chautauqua and Charles Hobbs filed this suit against the Corps on September 27, 1982 (D.E.I 1). National Marine intervened (D.E.I 5). After the permit was granted an amended complaint was filed (D.E.I 11). The plaintiffs alleged that they are vitally interested in preserving the aesthetic, recreational, fish and wildlife, and other values of this unique resource. They alleged that the Corps, in granting the permit, failed to comply

with the National Environmental Policy Act, and with its own regulations and the CEQ regulations, in multiple respects. They asked that the permit be set aside, and its use enjoined. The Corps and National Marine moved for summary judgment.

In 1983 the State of Illinois filed a suit challenging the same permit, which was consolidated with the River Road case.

On April 20, 1984, the District Court at Alton granted summary judgment for plaintiffs (App. 28). The District Court ruled that the Environmental Assessment and Findings of Fact did not evidence that the District Engineer had taken the requisite "hard look" at the effect of the proposed fleeting operation on the aesthetic and recreational values of this unique resource, or on the mussels and

overwintering catfish (App. 33-34). The District Court further ruled that the Corps had failed to fulfill the requirement of both statute and regulation that alternatives be assessed and that the cumulative impact of all pending fleeting applications in Alton Lake be evaluated (App. 33-34). The Court declined to rule that an EIS must be prepared in respect to the issuance of the permit, but set aside the permit and enjoined further fleeting at the site, and remanded the proceeding to the Corps, leaving the Corps to take a hard look at the environmental consequences and then to take such action as the Corps would find appropriate (App. 35).

5. Proceedings in the Court of Appeals

The defendants in each of the two consolidated cases appealed, and the

Seventh Circuit consolidated the two appeals. On May 17, 1985, the court of appeals reversed, by a 2-1 vote (App. 1, 15). The court not only set aside the summary judgment entered by the District Court, but also, having determined that no EIS was required, ordered the District Court to dismiss the case, without a trial (App. 13).

The court did not review the question whether the Corps had taken a hard look at the environmental impacts. Instead the court "recast . . . the main issue on appeal as whether the Corps should have prepared an environmental impact statement" (App. 4).[4/]

Explicating the "significant" impact

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4. In so doing the court reaffirmed the Seventh Circuit rule that "an agency's decision not to prepare an environmental impact statement will be set aside only if it is an abuse of discretion" (App. 6).

which requires the preparation of an EIS, the court defined "significant" as meaning that "the time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides" (App. 6). The court explicitly rejected the CEQ regulatory definition of "significant," characterizing it as "non-directive" (App. 8). The court then set forth its judgment as to the significance of the various environmental impacts, and determined that they were not "significant," as the court had defined that term.

Finally, the court held that the Corps had no duty to evaluate alternative sites, because the permit applicant had "found none suitable," and the plaintiffs were said to be not prepared "to shoulder

the burden of showing that National Marine had overlooked some plausible alternative site" (App. 12-13).

The dissenting judge disagreed with the majority's recasting of the issue on appeal, and its proceeding "with its own de novo consideration of the problems" (App. 16). He reviewed the various environmental impacts of the fleeting facility, and concluded that these should have prompted the Corps to take a hard look, and to seek out suitable alternatives (App. 21). He rejected the "majority hold[ing] . . . that the Corps, in spite of the statute and regulations, was entitled to accept the company's view of alternate sites" (App. 22). He would affirm the District Court's ruling, leaving open to the Corps the possibility of taking a hard look, with "special emphasis" on alternative sites (App. 23).

Petitions for rehearing, with suggestion for rehearing en banc, were denied by the court en banc on August 8, 1985, by a vote of 5-5 (App. 26).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals jeopardizes the norm of judicial review by expanding judicial review in an extraordinary manner. Moreover, it imperils the vitality of the National Environmental Policy Act ("NEPA"), by (1) superimposing on NEPA a new prerequisite to the preparation of an environmental impact statement ("EIS"), namely, a determination that "the time and expense of preparing an environmental impact statement are commensurate with the likely benefits," and (2) abrogating the agency's statutory duty to consider alternatives to the proposed agency action.

1. In substituting its own judgment for that of the agency as to "whether an environmental impact statement had to be filed," the decision below conflicts with the settled law of judicial review

Since 1943 the fundamental basis of judicial review of administrative action has been firmly settled. "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." **Securities & Exchange Comm'n v. Chenery Corp.**, 318 U.S. 80, 87 (1943). Even if, on judicial review, the agency's counsel develops a more presentable rationale, the courts will not consider that rationale. "For reviewing courts to substitute counsel's rationale . . . for that of the [agency] is incompatible with the orderly function of the process of judicial review." **N.L.R.B. v. Metropoli-**

tan Life Ins. Co., 380 U.S. 438, 444 (1965). See also **Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.**, 463 U.S. 29, 43 (1983). The reason for this rule is simple. Congress has mandated that the agency develop expertise, and use that expertise to decide whether a proposed rationale is persuasive or not.

The courts have consistently followed **Chenery** and **Metropolitan Life** in reviewing administrative action for compliance with NEPA.[5/] In enacting NEPA,

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5/. The National Environmental Policy Act of 1969 ("NEPA") is, as it was intended to be, a far-reaching law, applicable to every federal agency. It requires that each agency, before undertaking a major federal action, demonstrate that it has taken into account the environmental consequences of the proposed action, by preparing and filing an environmental impact statement ("EIS"). The regulations implementing this statute and the judicial decisions interpreting this statute have established that an agency can decline to prepare an EIS on

the primary goal of Congress was to require that, before taking a major action, a federal agency evaluate and consider the environmental consequences; in short, the agency must look before it leaps. Accordingly, this Court has ruled:

> Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. . . . The only role for a court is to insure that the agency has taken a "hard look" at environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."

Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). This rule has been repeatedly reaffirmed. **E.g., Strycker's Bay**

5/ cont'd.

the basis of an environmental assessment ("EA") which convincingly demonstrates that no significant environmental impact will result from the proposed action.

Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980); **Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.**, 462 U.S. 87, 97 (1983). Until now, this rule has been followed by all of the lower courts, in cases too numerous to cite here.[6/]

6/. To implement the "hard look" analysis, consistent with the time-honored principle that judicial review is to be based upon the rationale advanced by the administrative agency, the courts of appeals have identified two questions to be resolved on judicial review, by examination of the administrative Environmental Assessment ("EA") and Findings of Fact:

1. Whether the agency identified the relevant areas of environmental concern; and

2. As to those areas, whether the agency made a convincing case that the impact was insignificant.

E.g., Town of Orangetown v. Gorsuch, 718 F.2d 29, 35 (2d Cir. 1983); **Township of Lower Alloways Creek v. Public Service Elec. & Gas Co.**, 687 F.2d 732, 741 (3d Cir. 1982); **Sierra Club v. United States Dept. of Transportation**, 753 F.2d 120,

The District Court followed this rule. The District Court closely examined the Corps' findings, and found that the Corps had failed to take the requisite "hard look" at the aesthetic consequences of the proposed barge fleeting permit, at the effects on recreational activities including boating, at the cumulative impact of this and other proposed barge fleeting permits, and at the effect on mussels and over-

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6/ cont'd.

127 (D.C. Cir. 1984); **The Steamboaters v. Federal Energy Regulatory Comm'n**, 759 F.2d 1382, 1393 (9th Cir. 1985). Both questions, if asked by the court below, would have to be answered in the negative. The decision below is in conflict with these decisions.

These are the appropriate questions, whether the court invokes the "arbitrary and capricious" (Second and District of Columbia Circuits) or the "unreasonable" (Third and Ninth Circuits) standard of review.

wintering catfish. The District Court also found that the Corps had failed to take a hard look at the highly controversial aspects of the proposal, and had failed adequately to evaluate alternatives. In a restrained decision, the District Court declined to rule that an EIS was required, but remanded the proceeding to the Corps and ordered that, before issuing the barge fleeting permit, the Corps must take the requisite "hard look" at the environmental consequences.[7/] See pp. 16-17, **supra**.

7/. In declining, on the basis of the inadequate Corps Findings, to determine whether an EIS is required, and in remanding the proceeding to the Corps for further consideration of the need for an EIS, the District Court was exhibiting the care and restraint required by the norm of judicial review. **E.g., Fritiofson v. Alexander**, 772 F.2d 1225, 1248-49 (5th Cir. 1985). The failure of the court of appeals to follow the norm is illustrated by the court's assertion that the "usual consequence of . . . a decision [that the agency had failed to

The District Court's findings are amply supported by the record. For example, the Corps refused to consider in any way the cumulative impact of this and other proposed barge fleeting permits, and refused to consider any alternatives, because the applicant considered no alternatives satisfactory (App. 58). The Corps not only failed to take a hard look at the effects the barge fleeting would have on the catfish, the Corps refused to look at them at all (I: 280). The environmental consequences which were mentioned in the Corps' findings were disposed of with conclusory, sometimes erro-

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7/ cont'd.

take a hard look at the environmental consequences] is an order to prepare an environmental impact statement" (App. 4). At every turn, the decision below is in conflict with **Fritiofson**, which is a model of adherence to the mandate of this Court.

neous statements.

The court of appeals declined to review the District Court's findings. Instead, the court of appeals, in its own words,

> recast . . . the main issue on appeal as whether the Corps should have prepared an environmental impact statement.

App. 4. In short, the court of appeals substituted its own independent judgment on the significance of the environmental impacts and on the ultimate question whether an EIS must be prepared. This de novo effort is startling in light of the settled law of judicial review. If this decision prevails, the court of appeals will have done exactly what this Court has forbidden: "substitute its judgment for that of the agency as to the environmental consequences of its actions." **Kleppe, supra,** at 410 n.21. See also

Fritiofson v. Alexander, 772 F.2d 1225, 1238 (5th Cir. 1985).

This substitution of the court's judgment for the agency's expertise is not just a matter of words or form. The dissenting opinion below protested the majority's proceeding "with its own de novo consideration of the problems" (App. 16). The following five examples are illustrative.

A. The court of appeals held (erroneously) that the test for determining whether an impact is "significant," so that it requires an EIS, is "whether the time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides" (App. 6). See pp. 37 - 45, infra. After making this evaluation, the court below answered this

question in the negative. Thus, the court of appeals substituted its own judgment for that of the Corps. The Corps, for good reason, had made no such evaluation. However, the Corps has subsequently decided to prepare an EIS for the entire Alton Lake, 50 Fed. Reg. 10833 (March 18, 1985).

B. The court of appeals determined, on its own, that other applications for permits for fleeting facilities pending at the time of the Corps' granting of the permit at issue in this case were so "geographically remote" from the site of this permit that the Corps had no obligation to consider the cumulative impact of the various permit applications (App. 12). The Corps, for good reason, had made no such determination. In fact, as noted above, the Corps has now made a contrary determination, in undertaking the preparation of an environmental im-

pact statement for the entire Alton Lake.[8/]

In determining for itself the geographic area in which these cumulative or

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8/. Included in the first Question Presented is the question whether the Corps, in granting this permit for fleeting on the upper reaches of Alton Lake, is required to evaluate the cumulative impact of the multiple applications, then pending, for barge fleeting permits on Alton Lake. The Corps' refusal to do so is contrary to law. As this Court has stated,

> When several proposals . . . that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.

Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976). See also **Fritiofson v. Alexander**, 772 F.2d 1225, 1242-43 (5th Cir. 1985); **Natural Resources Defense Council, Inc. v. Callaway**, 524 F.2d 79, 88-89 (2d Cir. 1975). This principle is set forth in detail in the CEQ regulations, which are binding on the various agencies. See 40 C.F.R. §§ 1508.7, 1508.27(b)(7), pp. A-9, A-12, **infra. Fritiofson, supra.** See also 33 C.F.R. § 320.4(a). Accordingly, the Corps' action was plainly unlawful.

synergistic environmental impacts may occur, the court below decided not to follow the explicit mandate of this Court:

> [D]etermination of the extent and effect of these factors, and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.

Kleppe v. Sierra Club, supra, 427 U.S. at 414.

C. The court of appeals determined for itself that the plaintiffs in this litigation were not prepared "to shoulder the burden of showing that National Marine had overlooked some plausible alternative site" (App. 13). The Corps, for good reason, had made no such determination.

D. The court of appeals determined, sua sponte, that the proposed barge

fleeting operation will present "no danger of obstructing small (or for that matter large) boats" (App. 11). The Corps, for good reason, had made no such determination.

E. The court of appeals, sua sponte, determined that "there is no reason to believe that catfish are significantly affected by so small a reduction in their stamping grounds" (App. 11). The Corps, having been put on notice by the U.S. Fish and Wildlife Service and Illinois Geological Survey that catfish are the prime commercial fish in the Mississippi and that the harvest in Alton Lake had declined by 40% over a recent fifteen-year period (II: 151-152), had made no such determination.

The court of appeals made a number of other determinations sua sponte, without any support in the Corps' findings.

Thus the court of appeals consistently substituted its judgment for the judgment of the agency as to the environmental consequences of the agency action. The court has decided not to follow **Kleppe, Chenery, Metropolitan Life**, and their numerous progeny adhering to the norm of judicial review.

Included in the first Question Presented is the question whether the court, in reviewing an agency decision not to prepare an EIS, is to use the "unreasonable" or the "arbitrary and capricious" standard. The various courts of appeals are almost evenly divided. See **Gee v. Boyd**, ___ U.S. ___, 105 S.Ct. 2123, 85 L. Ed.2d 487 (April 22, 1985) (Justices White, Brennan and Marshall, dissenting). See also **Fritiofson v. Alexander**, 772 F.2d 1225, 1237-38 (5th Cir. 1985); **Louisiana v. Lee**, 758 F.2d 1081 (5th Cir.

1985), petition for certiorari filed, No. 85-569, 1985 Term, sub nom. **Dravo Basic Materials Co. v. Louisiana.** The decision below follows the Seventh Circuit rule of "arbitrary and capricious" or "abuse of discretion." This Court should grant certiorari to clear up this conflict.[9/]

The "confusion" noted in **Gee v. Boyd** is exacerbated by the circuit court's substitution of its own judgment for that of the agency as to environmental consequences, and by its superimposition of a new economic sine qua non for the pre-

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9/. This conflict between the circuits was noted in these petitioners' brief in the court of appeals, but was not discussed at length for two reasons. First, the Seventh Circuit had firmly adopted its position, and petitioners had no realistic hope of changing that position at that level. Second, the ruling of the District Court was so clearly correct that it would have to be affirmed under any standard, if the court of appeals would review that ruling under the **Kleppe** doctrine.

paration of an EIS. The concomitance of these Questions in this case calls for review by this Court, which should grant certiorari to preserve normative judicial review of administrative actions, especially those actions challenged under NEPA.

2. In establishing a new prerequisite to the preparation of an EIS, which requires that the

> **"time and expense" of preparation be "commensurate with the likely benefits,"**

the decision of the court of appeals goes far to devitalize NEPA, in conflict with Congressional, Executive and Judicial mandates.

NEPA requires that an EIS be prepared whenever the proposed action may "significantly" affect the quality of the human environment. NEPA provides no exception for cases where the cost of the EIS is evaluated as outweighing its benefits.

The CEQ regulations define "significantly" in detail, at 40 C.F.R. § 1508.27 (p. A-11, **infra**). Generally the term "refers to the severity of impact." 40 C.F.R. § 1508.27(b). Among the matters to be considered is "the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5). An impact is not insignificant simply because it might be expensive to find out how severe the impact will be.

The court below explicitly rejected this CEQ regulation as "nondirective." Included in the second Question Presented, therefore, is the question whether the 1979 revised CEQ regulations are binding, or merely suggestive. On this question the decision below conflicts with numerous decisions.

The CEQ, the administrative agencies, and the courts have consistently ruled that these regulations (and specifically the CEQ definition of "significant") are binding on the various agencies. **E.g., Fritiofson v. Alexander**, 772 F.2d 1225, 1236, 1242 (5th Cir. 1985) (CEQ definition of "significant" is "binding on federal agencies"); **Save Our Ecosystems v. Clark**, 747 F.2d 1240, 1244 (9th Cir. 1984) (CEQ definition of "significant" is binding"); **Sierra Club v. Sigler**, 695 F.2d 957, 964 (5th Cir. 1983) ("CEQ regulations implementing NEPA are binding on all federal agencies"); **Cabinet Mountains Wilderness v. Peterson**, 685 F.2d 678, 682 (D.C. Cir. 1982); **National Indian Youth Council v. Watt**, 664 F.2d 220, 225 (10th Cir. 1981); **Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark**, 720 F.2d 1475, 1478 (9th Cir. 1983), cert.

denied, 105 S.Ct. 446 ("The CEQ's regulations are binding on administrative agencies"). The decision below that CEQ regulations are nondirective will influence federal agencies to pretermit CEQ regulations.

The Corps' regulations, as well, time and again require the District Engineer, in determining whether an EIS is required, to assess and discuss the environmental impact, whether or not that task is expensive. See, e.g., 33 C.F.R. Part 230, App. B, § 8(a); 33 C.F.R. §§ 230.5(e), 230.9, 230.10; 33 C.F.R. § 320.4(a), (e). See also CEQ regulations at 40 C.F.R. § 1500.2, 1508.7, 1508.9(a)1.

This Court, as noted above, has ruled that the role for a court is to assure that the agency has taken a "hard look" at the environmental impacts, not just a

hard look at the impacts readily perceptible without investigation or expenditure of money. **Kleppe, supra,** at 410 n.21. And the lower courts have consistently ruled:

> Considerations of administrative difficulty, delay or economic cost will not suffice to strip [§ 102 of NEPA] of its fundamental importance.

State of Louisiana v. Federal Power Comm'n, 503 F.2d 844, 874 (5th Cir. 1974). See also **Calvert Cliffs' Coordinating Committee, Inc. v. AEC,** 449 F.2d 1109, 1115 (D. C. Cir. 1971). **Cf. Sierra Club v. Peterson,** 717 F.2d 1409, 1414 (D.C. Cir. 1983); **Natural Resources Defense Council, Inc. v. Callaway,** 524 F.2d 79, 90 (2d Cir. 1975), cert. den. 424 U.S. 967; **Foundation for North American Wild Sheep v. U. S. Dept. of Agriculture,** 681 F.2d 1172, 1181 (9th Cir. 1982).

This is not to say that the permit may not be granted, or other federal action taken, unless and until an outlandish sum has been expended in pursuit of some esoteric data, or some answer has been found to a question which exceeds the limits of research capabilities. Disproportionate expense or impossibility of assessing environmental impact is a factor to be considered in preparing an EIS; it is not an excuse for refusing to prepare an EIS. As a part of the EIS, the agency may determine that the cost of eliminating some uncertainty exceeds the costs of the uncertainty. However, it may do so only on the basis of a "worst case" analysis. 33 C.F.R. Part 230, App. B § 3; 40 C.F.R. 1502.22.[10/]

10/ The "worst case analysis" is explained in the cited regulations and in the cases cited in the text. Briefly, if information relevant to adverse impacts

"The CEQ regulation permits an agency to proceed after it weighs the costs of uncertainty." **Sierra Club v. Sigler**, 695 F.2d 957, 971 (5th Cir. 1983). The costs are to be weighed by the agency, not by a court of appeals, and they are to be weighed in an EIS, not in the preliminary determination whether or not to prepare an EIS. **Sierra Club v. Sigler, supra**; **Save Our Ecosystems v. Clark**, 747 F.2d 1240, 1244, 1247 n. 11 (9th Cir.

10/ cont'd.

is essential to a reasoned decision among alternatives, and is not known, and overall costs of obtaining it are exorbitant, the agency must, in the EIS, weigh the need for the action against the risk and severity of possible impacts. Before proceeding, the agency must analyze the worst theoretically possible impacts, and indicate the probability or improbability of their occurrence. The CEQ is proposing to change this "binding" regulation, but the proposal will remain applicable only to the preparation of an EIS, and will not affect consideration of the question whether an EIS must be prepared. See 50 Fed. Reg. 32234, August 9, 1985.

1984).[11/]

Notwithstanding this settled law, the court of appeals has superimposed upon NEPA a new test to determine whether an EIS must be prepared:

> whether the time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides.

App. 6. This new test goes far to devitalize § 102(2)(C) of the National Environmental Policy Act. The decision conflicts with the applicable decisions of this Court and other courts, as well as the regulations of CEQ and the various

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11/. Where an annual Environmental Assessment supplements a programmatic EIS, the worst case analysis may be included in the Environmental Assessment, for the two documents are evaluated together. **Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark**, 720 F.2d 1475, 1480 (9th Cir. 1983), cert. denied, 105 S.Ct. 446.

administrative agencies. This unprecedented change in the law will lead to confusion in administrative agencies and in courts. This Court should grant certiorari to head off this confusion.

3. In ruling that an administrative agency need not consider alternatives, the decision below conflicts with the statute, the regulations, and the decisions of other courts of appeals

The Corps evaluated no alternative sites, because National Marine (the applicant) had "found none suitable" (App. 12). Thus the Corps violated the mandate of 42 U.S.C. § 4332(2)(E), which states that the Corps "shall study, develop and describe appropriate alternatives." The "requirement for a thorough study and a detailed description of alternatives . . . is the linch-pin of the entire impact statement." **Monroe County Conservation Council, Inc. v. Volpe**, 472

F.2d 693, 697-98 (2d Cir. 1972). This statutory mandate is replicated in the regulations of CEQ and the regulations of the Corps. See, e.g., 33 C.F.R. §§230.5(e) and 230.9(c); 33 C.F.R. Part 230, Appendix B §8(a); 33 C.F.R. §320.4(a)(2)(ii); 40 C.F.R. §§ 1500.2(e), 1501.2(c), and 1508.9(b).

Nevertheless the court below rationalized this failure of the Corps by (1) noting that the applicant found no suitable alternatives, and (2) asserting that the Corps is not required to go beyond the applicant's findings because the plaintiffs were not prepared "to shoulder the burden of showing that National Marine had overlooked some plausible alternative site" (App. 13). On both points the decision below is in conflict with the decisions of other circuits.

1. The Corps is required to make an

evaluation of alternative sites; the Corps "may not substitute a private firm's efforts and analysis for its own." **Essex County Preservation Ass'n v. Campbell**, 536 F.2d 956, 960 (1st Cir. 1976); **Brandon v. Pierce**, 725 F.2d 555, 564 (10th Cir. 1984); **Trinity Episcopal School Corp. v. Romney**, 523 F.2d 88, 94 (2d Cir. 1975); **Natural Resources Defense Council v. Callaway**, 524 F.2d 79, 87 (2d Cir. 1975).

2. The supposed failure of the plaintiffs to suggest alternative sites does not excuse the Corps from making its own study. The statute and the regulations place the burden on the agency to explore all alternatives, whether any interested citizens suggest any or not. 42 U.S.C. §§ 4332(2)(C)(iii) and (E); 33 C.F.R. §§ 230.5(e) and 230.9(c); 33 C.F.R., Part 230, Appendix B §8(a); 33 C.F.R.

Section 320.4(a)(2)(ii); 40 C.F.R. §§ 1500.2(e), 1501.2(c), and 1508.9(b). The decision below conflicts with **Calvert Cliffs' Coordinating Committee, Inc. v. AEC**, 449 F.2d 1109, 1119 (D.C. Cir. 1971):

> The primary responsibility for fulfilling [the] mandate [of NEPA] lies with the Commission. Its responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage.

Thus, in substituting the applicant's evaluation of alternative sites for its own, and in imposing on the citizenry at large the burden of suggesting alternative sites to be considered, the decision below conflicts with the statute, the regulations, and all applicable decisions. On the matter of alternatives alone, the decision below will cause confusion in the agencies and in the courts. This Court should grant

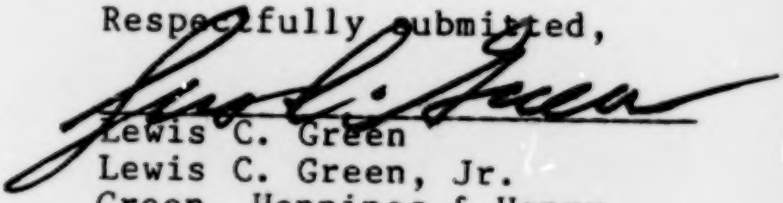
certiorari to head off that confusion.

CONCLUSION

The decision below fundamentally changes the norm of judicial review, which has been unquestioned for decades. It goes far to devitalize NEPA and its implementing regulations, in conflict with the decisions of the courts.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

APPENDIX

National Environmental Policy Act

42 U.S.C. 4332

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall -

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environment Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

. . . .

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources; . . .

33 C.F.R. Part 230

§230.5 Policy

The U.S. Army Corps of Engineers, under the direction and supervision of the Secretary of the Army, will continue to implement vigorously the National Environmental Policy Act of 1969, applicable environmental quality statutes and the regulations of

the Council on Environmental Quality in carrying out its Civil Works mission consistent with statutory responsibilities and other essential considerations of national policy . . . [T] he goals and policies of NEPA will be considered to insure decisions in the public interest. To this end, the Corps will:

. . . .

(d) Prepare and make available to the public environmental documents for Corps actions and activities. Documents shall be clear, concise, emphasize significant issues and be supported by necessary environmental analysis.

(e) Explore, study and analyze all reasonable alternatives, including non-structural alternatives, with a view to selecting a plan or approving an action that can best satisfy specified needs.

(f) Identify and make provisions for preserving unique cultural and biological resources, such as historic and archeological sites and threatened, endangered, and other significant species and their habitats.

. . . .

(h) Implicit in this policy are four general environmental goals:

(1) To preserve unique and important ecological, aesthetic, and cultural values of our national heritage.

(2) To conserve and use wisely the natural resources of our nation for the benefit of present and future generations.

(3) To restore, maintain, and enhance the natural and man-made environment in terms of its variety, beauty, and other measures of quality.

(4) To create new opportunities for the American people to use and enjoy their environment.

. . . .

§230.9 Environmental Assessments (EA).

(a) Purpose. An EA is a brief document which provides sufficient information on potential environmental effects of the proposed action and its alternatives, to the district engineer, to determine if an EIS is required and to assist the district engineer in complying with NEPA whether or not an EIS is necessary. The district engineer is recognized as the responsible Corps NEPA official who will make this determination in the FONSI prepared for the proposed action. . . .

(c) Format. While no special format is required, the EA should include a brief discussion of the need for the proposed action, its environmental impacts, alternatives to the proposed action and a list of the agencies, interested groups and the public consulted.

. . . .

§230.10 Finding of No Significant Impact (FONSI).

A FONSI shall be prepared by the district engineer or delegated official to accompany an EA prepared for a proposed action when, as a result of the analysis included in the EA, it is concluded that the proposed action will not have significant effects on the environment. The FONSI will be based on the information analyzed in the EA, reflecting pertinent data obtained from cooperating Federal agencies having jurisdiction by law and/or special expertise and the interested public. It shall briefly present the reasons why the action will not have a significant impact on the quality of the human environment and state that an EIS is not required. . . .

33 C.F.R. Part 230, Appendix B

8. EA/FONSI Document. (See 40 CFR 1508.9 and 1508.13 for definitions).

a. Environmental Assessment (EA). The district engineer shall prepare an EA as soon as praticable after all relevant information has been made available to the district engineer (i.e., after the comment period for the public notice announcing receipt of the permit application has expired) and prior to preparation of the Findings of Fact (FOF). The EA shall include a discussion of the reasonable alternatives. . . . [T]he EA must address all the alternatives, that go before the ultimate decision maker. This discussion will include suggested means by which the environment might be protected and by which adverse impacts could be reduced by conditioning of the permit. The EA shall be a brief document (should not normally exceed 15 pages) primarily focusing on whether or not the entire project subject to the permit requirement could have significant effects on the environment but shall not be used to justify a decision . . . The EA shall conclude with a FONSI (See 40 CFR 1508.13) or a determination that an EIS is required.

. . . .

33 C.F.R. Part 320

§320.4 General policies for evaluating permit applications.

The following policies shall be applicable to the review of all applications for Department of the Army permits. Additional policies specifically applicable to certain types of activities are identified in Parts 321-324.

(a) Public interest review. (1) The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts

of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of the general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.

(2) The following general criteria will be considered in the evaluation of every application:

(i) The relative extent of the public and private need for the proposed structure or work;

(ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; . . .

. . . .

(c) Fish and wildlife. In accordance with the Fish and Wildlife Coordination Act (paragraph 320.3(e) of this part) Corps of Engineers officials will consult

with the Regional Director, U.S. Fish and Wildlife Service, the Regional Director, National Marine Fisheries Service, and the head of the agency responsible for fish and wildlife for the state in which work is to be performed, with a view to the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application. They will give great weight to these views of fish and wildlife considerations in evaluating the application. . . .

(e) Historic, cultural, scenic and recreational values. Application for permits covered by this regulation may involve areas which possess recognized historic, cultural, scenic, conservation, recreational or similar values. Full evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on values such as those associated with wild and scenic rivers, registered historic places and natural landmarks, National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, estuarine and marine sanctuaries, archeological resources, including Indian religious or cultural sites, and such other areas as may be established under Federal or state law for similar and related purposes. Recognition of those values is often reflected by state, regional, or local land use classifications, or by similar Federal controls or policies. Action on permit applications should, insofar as possible, be consistent with and avoid significant adverse effects on the values or purposes for which those classifications, controls, or policies were established. . . .

(j) Other Federal, state, or local requirements.

. . . .

(2) Where officially adopted Federal, state, regional, local or tribal land-use classifications,

determinations, or policies are applicable to the land or water areas under consideration, they shall be presumed to reflect local factors of the public interest and shall be considered in addition to the other national factors of the public interest identified in §320.4(a) of this part. . . .

40 C.F.R. Part 1500

§1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses. . . .

. . . .

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment. . . .

§1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall: . . .

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)E of the Act. . . .

§1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. . . .

§1508.9 Environmental assessment.

"Environmental Assessment":

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an

environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted. . . .

§1508.18 Major Federal action.

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies. . . .

(b) Federal actions tend to fall within one of the following categories:

. . . .

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

. . . .

§1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with signficant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.